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In the Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, ET AL., APPELLANTS

v.

NICK THEODORE, ET AL.

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA, APPELLANT

v.

NICK THEODORE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the district court gave adequate consideration to the requirements of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, in imposing redistricting plans for use in congressional and state legislative elections in South Carolina.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. South Carolina's General Assembly consists of a Senate and a House of Representatives. Statewide Reapportionment Advisory Committee, et al. (SRAC) J.S. App. 4; S.C. Const. Art. III, § 1. The 46 members of the Senate and the 124 members of the House are elected from single-member districts. SRAC J.S. App. 4; S.C.

Const. Art. III, §§ 3, 6. In addition, South Carolina is entitled to six Representatives in the United States House of Representatives. SRAC J.S. App. 5.

The 1990 census revealed that South Carolina's legislative and congressional districts were malapportioned. See, *e.g.*, SRAC J.S. App. 6 & n.13. The South Carolina General Assembly considered new districting plans to cure the malapportionment, but was unable to agree on such plans before the adjournment of the 1991 legislative session. *Id.* at 6-7.

2. In October 1991, Michael Burton, the Executive Director of the South Carolina Republican Party, and other South Carolina voters (the Burton plaintiffs) sued various state officials, alleging that South Carolina's then-existing election districts violated the one-person, one-vote requirement of the United States Constitution. App., *infra*, 2a, 5a-8a (Burton complaint). See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964) (state legislative districts); *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964) (congressional districts). The complaint also alleged violations of the prohibition in Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, against vote dilution on account of race.[1] App., *infra*, 2a, 8a-10a. Finally, the Burton plaintiffs alleged that the General Assembly would not be able to pass redistricting plans and have them precleared in accordance with Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, in time to hold the 1992 primary elections. App., *infra*, 5a-7a. The complaint sought an injunction against the State's use of the existing election districts and asked the court to adopt new plans for the 1992 elections. *Id.* at 11a-12a.

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[1] Section 2 prohibits practices that deny or abridge voting rights on account of race; in particular, it prohibits political processes that afford members of a protected class "less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice." 42 U.S.C. 1973(b).

A three-judge district court was convened pursuant to 28 U.S.C. 2284(a).

A separate group of plaintiffs, including the Statewide Reapportionment Advisory Committee (an unincorporated private association), the South Carolina NAACP, and several individual black voters, filed a similar lawsuit alleging that the existing election districts violated both the U.S. Constitution and Section 2 of the Voting Rights Act. App., *infra*, 13a-24a. The court consolidated the SRAC and Burton lawsuits, and it permitted the South Carolina Senate, the Democratic Party of South Carolina, and various others to intervene as defendants. SRAC J.S. App. 8-9.

The General Assembly reconvened in January 1992. It adopted redistricting plans for the state Senate and House, but did not agree on a congressional redistricting plan. SRAC J.S. App. 10-11. Cross-appellant Governor Campbell, a defendant below, vetoed both state redistricting plans on the ground that they failed to create sufficient numbers of effective minority districts and thereby violated the Voting Rights Act. Campbell J.S. App. 8-21. Both vetoes were sustained. SRAC J.S. App. 11.

After the vetoes, the district court decided that judicial intervention was unavoidable. SRAC J.S. App. 14. Because all parties stipulated that the State's existing electoral districts were unconstitutionally apportioned under one-person, one-vote principles, the court found it unnecessary to consider whether they also violated Section 2 of the Voting Rights Act. *Id.* at 3 n.2. The three-week trial focused instead on the parties' various redistricting proposals and the development of an appropriate judicial remedy. *Id.* at 11-12. In that context, however, the plaintiffs presented considerable evidence relevant to the question whether particular proposed plans or districts complied with the mandates of Section 2. That evidence included expert testimony on the extent of racially polarized voting in South Carolina, see *id.* at 56

n.49, as well as other evidence relating to the factors enumerated by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). In addition, the parties stipulated that "since 1984 there is evidence of racially polarized voting in South Carolina." SRAC J.S. App. 56.

3. On May 1, 1992, the district court announced that it was not adopting any of the redistricting plans proposed by the parties, but rather had drawn its own plans. SRAC J.S. App. 12. The court directed that its plans were to be used for the 1992 elections and for all subsequent elections until the State enacted. plans that were approved under Section 5 of the Voting Rights Act. *Id.* at 86.

Although both the Burton plaintiffs and the SRAC plaintiffs challenged South Carolina's existing electoral districts under Section 2 of the Voting Rights Act (as well as under the Constitution), App., *infra*, 8a, 13a, neither asserted a cause of action under Section 5 of the Voting Rights Act. The district court nevertheless began its analysis by stating that the proceedings "ar[ose] under" Section 5, SRAC J.S. App. 13, and by setting out three principles that it considered applicable to a Section 5 analysis.

First, the court concluded that, to the extent consistent with federal law, it should honor the State's own "policies and preferences." SRAC J.S. App. 14 (quoting *White* v. *Weiser*, 412 U.S. 783, 795 (1973)). Based on the South Carolina Constitution and the history of the State's past redistricting efforts, the court identified a "preeminent" state policy of "maintaining the integrity of county boundaries in the redistricting process." SRAC J.S. App. 15-16. Second, the court concluded that it was bound by "stringent equal population requirements" in imposing a congressional redistricting plan, *id.* at 17, but that its plans for the state legislature might reflect "de minimis" variations in district populations. *Id.* at 24. Third, the court held that its plans must not be "retrogressive"—

that is, there must be no "diminution in minority opportunity from what it had been under an earlier plan." *Id.* at 25-26 (citing *Beer* v. *United States*, 425 U.S. 130, 141 (1976), and *City of Lockhart* v. *United States*, 460 U.S. 125 (1983)).

While thus viewing this case as "a § 5 proceeding," the district court recognized that "[i]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of § 2." SRAC J.S. App. 38. The court held, however, that "complete adoption" of Section 2 standards was "unwarranted," for three reasons. *Id.* at 38-39. First, the court cited "fundamental differences" between Section 2 and Section 5, see *id.* at 39-42, noting in particular that a typical Section 2 plaintiff is "attacking an existing practice," whereas in these proceedings, the court was "operating more in the nature of a forum" and considering five or more proposed districting plans for each of three legislative bodies. *Id.* at 41 (emphasis omitted). Second, the court stated that it did not have time to conduct the "strenuous" fact-finding that would be required for a full Section 2 challenge to each of the proposed plans before adopting plans for use in the 1992 elections. *Id.* at 43-44. Finally, the court found a "lack of legislative or judicial guidance" requiring "a blanket rule that § 2 guidelines should be infused into § 5." *Id.* at 44.

For these reasons, although the court rehearsed all of the factors relevant to finding a violation of Section 2 identified by this Court in *Gingles*, see SRAC J.S. App. 33-38, it ultimately chose to evaluate various plans only against the three threshold factors for Section 2 liability identified in *Gingles*,[2] as well as several additional factors identified by the court itself (SRAC J.S. App. 46):

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[2] "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * *

> 1) the extent to which the plans * * * are consistent with the retrogression standard set forth in *Beer* and *City of Lockhart* [3]; 2) the extent to which reasonable compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist; [and] 5) the extent to which the lines which have been drawn limit the number of majority-black single-member districts in light of the expressed state policies of the State of South Carolina.

In applying those factors, the district court stated that its analysis "should ensure that the [*Gingles*] threshold requirements of a § 2 action cannot be established under the adopted plan[s]." SRAC J.S. App. 45. The court did not, however, determine "the extent to which voting is polarized in South Carolina" generally or in particular proposed districts; instead, the court concluded that the degree of racially polarized voting "remains an open question and will certainly vary from locality to locality." *Id.* at 56. In determining that it had created a sufficient number of "black opportunity districts"—*i.e.*, districts in which black citizens could be presumed to have the ability to elect the candidate of their choice—the court defined such a district as one with a black voting-age population "greater than 50 percent," *id.* at 48, and gave considerable weight to the goal of preserving county and precinct lines. It did not address the plaintiffs' arguments that because of specific conditions in South Carolina or in particular proposed districts, a black voting-age popula-

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Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51.

[3] See *Beer* v. *United States*, 425 U.S. 130, 141 (1976), and *City of Lockhart* v. *United States*, 460 U.S. 125 (1983), applying the non-retrogression principle in Section 5 cases.

tion of 57% or more was needed for black voters to have a realistic opportunity to elect their chosen candidates. See, *e.g.*, *id.* at 25-26. Nor did the court specifically consider whether the dictates of Section 2 should override any contrary state policy in drawing particular districts.

4. a. Applying these principles to South Carolina's Senate districts, the court devised a plan that provided for ten districts (21.7% of the total of 46 districts) in which blacks constituted more than 50% of the voting-age population.[4] SRAC J.S. App. 67. Because, using 1990 census figures, blacks constituted more than 50% of the voting age population in only nine of the existing districts, the court concluded that its plan was not retrogressive in violation of Section 5. *Id.* at 67. Blacks made up less than 65% of the voting age population in each of the Senate districts under the court's plan, and less than 55% in five out of the ten. *Id.* at 68. The plans proposed by the Governor and the Burton plaintiffs had smaller total population deviations and more majority black districts, but the court rejected both plans because, in its view, they crossed too many precinct and county lines. SRAC J.S. 12; SRAC J.S. App. 61-65. The court also criticized those plans for creating districts in which the "only cognizable community of interest * * * is the black race," *id* at 64, and for reflecting "apparent partisan considerations" by pitting Democratic incumbents against one another. *Id.* at 65.

b. The court's plan for the state House districts resulted in 23 out of 124 districts (18.5%) in which blacks constituted more than 50% of the voting-age population. SRAC J.S. App. 72. The court found that its plan was not retrogressive because the existing plan, using 1990 census figures, contained only 21 such districts. *Ibid.* The court noted that four of the plans submitted by the parties also resulted in de minimis population

[4] According to the 1990 census, South Carolina's voting-age population is 26.9% black. See SRAC J.S. App. 88.

variations and created more black majority districts.[5] *Id.* at 73. But the court rejected those plans because, in its view, all of them called for "excess" cuts in county lines and three of the four unduly pitted incumbents against one another. *Id.* at 73-75.

At the same time, the court concluded that its plan for the House of Representatives "contain[ed] no obvious violations of § 2," because it recognized "those concentrations of black population in the state that are sufficiently large and geographically compact to form a majority in a single member district." SRAC J.S. App. 76. The court rejected the parties' plans calling for more majority black districts as attempts to "achieve proportional representation on the basis of race," without proper deference to "traditional state political units such as the county." *Id.* at 76-77. It also criticized some of the parties' proposed districts because of their "bizarre" shapes and because they lacked "any distinct communities of interest, apart from race, which would demonstrate district cohesiveness." *Id.* at 79. The court concluded that its plan, with fewer majority black districts, struck "the proper balance between the various interests arising in this type of proceeding, including equality of population in districts, racial fairness, and maintenance of the state's political subdivisions and communities of interest." *Ibid.*

c. The court's congressional districting plan achieved population equality. SRAC J.S. App. 80-81. Because all of the parties proposed plans having one majority black district, the court likewise drew one such district (out of six), with a 57.9% black voting-age population. The court did not decide whether such a district was legally required. *Id.* at 82-83. The court determined that its plan was not retrogressive for purposes of Section 5 because the then-existing plan had no black

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[5] The Republican plan created 36 majority black districts, the Governor's plan 35, and SRAC's plan 32. SRAC J.S. App. 76, 78.

majority district. *Id.* at 82. The court drew a congressional district encompassing the "general concentration of black population," preferring its plan to others that split fewer counties because the others showed a higher population deviation. *Id.* at 83-84.

DISCUSSION

The district court misunderstood the nature of the action before it. That error led the court to give inadequate consideration to, and to make inadequate findings concerning, allegations and evidence of violations of Section 2 of the Voting Rights Act. We take no position at this time as to whether the redistricting plans adopted by the court would in fact violate Section 2 if applied to elections held subsequent to 1992. Because we believe that review by this Court would be premature on the present record, we suggest that the Court remand the case and direct the district court to consider in detail (and to make appropriate findings and conclusions with respect to) objections raised by any party on the ground that the court's plans do not comply fully with the requirements of Section 2.

1. The district court erred in viewing this litigation as arising under Section 5 of the Voting Rights Act. Section 5 requires that changes in election practices proposed by a covered jurisdiction be "precleared," either through submission to the Attorney General or through a declaratory judgment action filed by the jurisdiction in the United States District Court for the District of Columbia. 42 U.S.C. 1973c. See generally *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 558-560 (1969). This litigation, by contrast, involved challenges brought by private plaintiffs against the responsible authorities of a covered jurisdiction, alleging that its existing election districts violated both Section 2 of the Voting Rights Act and the United States Constitution.

To be sure, because all parties to the litigation conceded the invalidity of the then-existing districting plans

under one-person, one-vote principles, the district court was not required to consider Section 2 challenges to specific existing electoral districts. The court instead properly focused on the nature of the new plans that should be put in place. In that setting, it was appropriate for the court to consider Section 5's general principle that electoral changes may not have the purpose or effect of denying or abridging voting rights on account of race. See SRAC J.S. App. 25; *McDaniel* v. *Sanchez*, 452 U.S. 130, 148-149 (1981). Nevertheless, the court's primary task was to fashion a remedy that would not itself violate the legal standards that the plaintiffs had sued to enforce. Contrary to the court's view, discharging that task required the court to ensure that the plans it adopted complied in all respects with the requirements of Section 2.

Two of the three reasons given by the district court for failing to undertake a complete Section 2 analysis stem directly from its misconception of the proceeding as one arising under Section 5. For example, any perceived differences between Section 5 and Section 2 litigation, see SRAC J.S. App. 39-42, are irrelevant to the question of what standards should be applied in fashioning an appropriate remedy in a case in which Section 5 is not even directly at issue, Section 2 violations have been alleged, and liability is conceded on constitutional grounds.[6] Likewise, the "lack of a clear legislative intent

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[6] Similarly, the district court's concerns about rendering an "advisory" opinion or "impair[ing] the duality of remedies currently afforded aggrieved parties under principles of *res judicata* or separation of powers," SRAC J.S. App. 42, can hardly be avoided by labeling as a Section 5 proceeding a suit that was clearly brought under Section 2 and the Constitution. It seems clear in this case that any such concerns could best be avoided by resolving all of the parties' claims under Section 2 with respect to the districting plans imposed by the court. The controversy is live and properly before the court; one definitive judgment and one remedy are necessary, and should suffice.

or judicial interpretation that the results test of § 2 should be completely imported into § 5," SRAC J.S. App. 39, is not a relevant concern in a case arising under Section 2 and the Constitution.

The court's final reason for refusing to undertake a full Section 2 inquiry—the imminence of the 1992 elections—was relevant only insofar as those elections were concerned. Although a court should always strive to ensure that any plan it imposes complies with Section 2, it has reasonable latitude in devising an interim remedy when it is confronted with tight time constraints. *Mahan* v. *Howell*, 410 U.S. 315, 332-333 (1973); *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982); *Reynolds* v. *Sims*, 377 U.S. at 585-587. The same time constraints do not apply, however, with respect to districts imposed for use in subsequent elections. Given the legislative deadlock after the 1990 census that necessitated the court's intervention in this case in the first place, see generally SRAC J.S. App. 5-12, the court's so-called "interim" plans, *id.* at 85-86, may well remain in place for the next ten years. To the extent that they do, the district court is obligated to subject them to a full Section 2 analysis.[7]

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[7] Appellee Theodore, the Lieutenant Governor of South Carolina, argues that these cases should be dismissed as moot because the 1992 elections have been held and the General Assembly may enact redistricting plans applicable to future elections. Theodore Mot. to Dismiss or Affirm 12-14. The district court's order applies, however, to all subsequent South Carolina elections unless and until the General Assembly enacts alternative plans that are successfully cleared under Section 5. SRAC J.S. App. 86. None of the cases appellee cites involved an order explicitly applicable to future elections. In *Watkins* v. *Mabus*, 112 S. Ct. 412, aff'g in part and vacating in part 771 F. Supp. 789 (S.D. Miss. 1991), for example, the district court's order provided an interim remedy and a procedure for devising plans for subsequent elections; only the interim remedy aspect of the case was found moot. 112 S. Ct. at 412. Appellee admits that the court-ordered congressional redistricting plan imposed after the 1980 census remained in effect for eight years. Theodore Mot. to Dismiss or Affirm 3 n.2. In any event, we suggest

2. The district court purported to apply the three fundamental requirements identified in *Gingles*—size and compactness of minority concentrations, minority political cohesiveness, and majority bloc voting [8]—so as to "insur[e] that the court's plan [would] not violate the threshold requirements for liability under § 2." SRAC J.S. App. 45-47. Properly applied, that approach might be an appropriate way for a court to avoid an unnecessarily extensive Section 2 inquiry. If, for example, the court had found that voting in South Carolina elections was not racially polarized, any Section 2 claim would have been destined to failure under *Gingles*, and there would have been little point in taking other evidence or making other findings relevant to such a claim.[9] In fact, however, the court made no such dispositive finding with respect to any of the *Gingles* threshold requirements.

a. The parties agree that the court had before it substantial evidence relevant to the factors identified in *Gingles* as probative of minority vote dilution in viola-

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remand of the case to the district court for precisely the sort of "concrete, district-by-district" review of the court's plans under Section 2 that appellee acknowledges (*id.* at 13) would be appropriate if the plans are to be utilized in future elections, using not only the current record but, if helpful, "evidence derived from the 1992 election regarding racial polarization, political cohesiveness and other Section 2 factors." *Id.* at 13-14. Should predictions of state legislative action be fulfilled while that review is in progress, the district court could terminate its review of the court-ordered plans as moot at that time. See, *e.g.*, SRAC J.S. App. 85-86.

[8] The term "polarization" tends to subsume the technically separate *Gingles* inquiries into minority cohesiveness and majority bloc voting. See, *e.g.*, *Gingles*, 478 U.S. at 56. Like the district court, we treat the two questions together. See SRAC J.S. App. 55.

[9] We agree with the court below that the three "necessary preconditions" identified in *Gingles*, 478 U.S. at 50-51, are "threshold requirements" for imposing a Section 2 remedy. See SRAC J.S. App. 36 & n.37. This is true in the context of both single-member and multi-member districts. See *Growe* v. *Emison*, 113 S. Ct. 1075, 1084 (1993); *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1157 (1993).

tion of Section 2. See Theodore Mot. to Dismiss or Affirm 26; SRAC J.S. 5-8; Sheheen Mot. to Dismiss or Affirm 14-15; Senate Mot. to Dismiss or Affirm 7-8. That evidence included expert testimony on the history of discrimination in South Carolina and expert statistical testimony on the extent of racially polarized voting. The parties also stipulated that there was racially polarized voting in South Carolina, but they disagreed on the extent and the effect of the polarization. See SRAC J.S. App. 56; Theodore Mot. to Dismiss or Affirm 26, 28-30; Senate Mot. to Dismiss or Affirm 7-8.

Presented with this evidence, and despite its declared intention to preclude establishment of the *Gingles* threshold factors with respect to its plans, the district court explicitly refused to resolve the issue of polarized voting. The court stated that "the extent to which voting is polarized in South Carolina remains an open question and will certainly vary from locality to locality," and it accepted as "sufficient for [its] analysis" the parties' general stipulation that there is evidence of racially polarized voting in South Carolina. SRAC J.S. App. 56. Although we agree with the Senate appellees that evidence of racial polarization or other factors would have to be more localized and specific to support creating or rejecting a challenged electoral district on Section 2 grounds, see Senate Mot. to Dismiss or Affirm 7-8 & n.8, the district court neither made specific findings rejecting the evidence of polarization in particular districts nor found as a general matter that polarization was not present. The court simply failed to address all relevant aspects of that crucial question, which goes to the heart of whether the plans it imposed comply with Section 2.

b. Similarly, the district court did not respond adequately to the question whether additional compact and contiguous districts with black majorities could and should have been created in disputed areas to avoid dilution of black voting strength in violation of Section 2. To be

sure, the court touched on those issues in discussing its plans. See SRAC J.S. App. 63-64 (discussing lack of "community of interest" in Senate District 10 proposed by Governor and state Republican Party); *id.* at 75-79 (concluding that court's House plan strikes appropriate balance between minority representation and other factors for purposes of Section 2, "given the nature of this proceeding"); *id.* at 82-85 (discussing Section 2 concerns and the creation of a majority-black congressional district). But the court's treatment of those issues was both legally flawed and insufficiently detailed to provide an adequate basis for appellate review.

i. Because the court did not determine the extent of racial bloc voting or consider the existence of historic barriers to minority participation in the electoral process in South Carolina, there was no basis for the court's finding that any district in which blacks constitute more than 50% of the voting age population may be considered a "black opportunity district." SRAC J.S. App. 48. Whether black voters have a realistic opportunity to elect their chosen candidates in any given district is a function of the circumstances prevailing in that district. *E.g., Jeffers* v. *Clinton,* 730 F. Supp. 196, 204-217 (E.D. Ark. 1989) (three-judge court), aff'd mem., 111 S. Ct. 662 (1991). Where access to the political process is limited by present discrimination or the present effects of past discrimination, a bare majority of the voting age population may not afford blacks a realistic opportunity to elect representatives of their choice. See, *e.g., Jeffers* v. *Clinton,* 756 F. Supp. 1195, 1198-1199 (E.D. Ark. 1990) (three-judge court); *Ketchum* v. *Byrne,* 740 F.2d 1398, 1410-1416 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Zimmer* v. *McKeithen,* 485 F.2d 1297, 1302-1304 (5th Cir. 1973), aff'd per curiam *sub nom. East Carroll Parish School Bd.* v. *Marshall,* 424 U.S. 636 (1976).

Based on evidence of polarization and historic patterns of voter registration and turnout in South Carolina, the plaintiffs in this case argued that a district should have a black voting-age population of at least 57% in order for black voters to have a realistic chance of electing their preferred candidates. SRAC J.S. 8; Campbell J.S. 21. The district court did not address that argument or justify its 50% figure in light of the "totality of the circumstances" in South Carolina or in any particular electoral district.[10] See SRAC J.S. App. 48. We think it was incumbent on the district court to resolve specific challenges to particular districts on the ground that they contained an insufficient majority of black voters, both to ensure in the first instance that its plans comply with the principles of Section 2 and to provide this Court with an adequate basis for appellate review.[11]

ii. The court also appears to have accorded undue deference to "state policy" in formulating its plans, placing

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[10] Although it is not clear from the court's discussion, the court may have based its 50% figure on the Fourth Circuit's conclusion that a particular North Carolina electoral district with a 51.8% black voting age population could be considered an opportunity district. See SRAC J.S. App. 48 (citing *McGhee* v. *Granville County*, 860 F.2d 110 (4th Cir. 1988)). It would not, of course, be appropriate to adopt particularized findings relevant to a specific district in North Carolina as a general standard applicable throughout South Carolina.

[11] In rejecting the notion (which we do not understand appellants to urge) that it should apply a bright-line "65 percent rule" in judging effective minority voting strength, the court did state that in formulating its plans it had used voting-age population figures and had taken specific account of "other factors" that might otherwise have justified a supermajority requirement. SRAC J.S. App. 48-50. But the court's discussion dealt only with the possible effect of incumbents on black voter turnout, and it did so only in cursory fashion. *Id.* at 49-50. The opinion includes no particularized consideration of historical voting patterns, election results, or other data to support treating identified districts as black "opportunity districts" in the face of plaintiffs' challenge to that characterization.

primary emphasis on preserving county and precinct lines. SRAC J.S. App. 13-16. While state policy is one factor to be considered under the "totality of the circumstances" test for determining compliance with Section 2, *Houston Lawyers' Ass'n* v. *Attorney General,* 111 S. Ct. 2376, 2381 (1991), the court's deference here was unjustified for two reasons.

First, it is not clear that preservation of county or precinct lines is an important or consistent state policy. Certainly it was not, in this case, a policy embodied in an official redistricting plan forged through the State's political process. See, *e.g., White* v. *Weiser,* 412 U.S. at 795-796 (quoted at SRAC J.S. App. 14-15). See also SRAC J.S. App. 16-17 (noting that the redistricting proposals submitted by various state officers or legislative bodies were not entitled to deference as state policy). That policy was instead deduced by the district court from the state Constitution and from a "historical analysis of the redistricting efforts of the South Carolina Senate." *Id.* at 15. The most recent source cited by the court was a plan enacted in 1972, *id.* at 15-16; the court did not analyze the extent to which county or precinct lines were preserved in the plans adopted after the 1980 census. See also Campbell J.S. App. 18-19 (Governor's veto message, questioning policy of not splitting precinct lines); *Jeffers* v. *Clinton,* 730 F. Supp. at 214-215 (even "fairly strong policies" carry little weight if not consistently applied); *Houston Lawyers' Ass'n,* 111 S. Ct. at 2381 (rejecting reliance on "trivial or illusory" state interests).[12]

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[12] In contrast to its deference to the supposed state policy of preserving political boundaries, the court announced that it would give no preference to incumbents because that was not a "legitimate concern" for a court to take into account in fashioning a plan. SRAC J.S. App. 64-65, 75. The court nonetheless severely criticized various of the parties' proposals for protecting or attempting to eliminate incumbents on partisan grounds, *id.* at 65 & n.61, 74-75,

Second, as this Court recognized in *Houston Lawyers' Ass'n*, the State's interest "is merely one factor to be considered in evaluating the 'totality of circumstances,' " and "that interest does not automatically, and in every case, outweigh proof of racial vote dilution." 111 S. Ct. at 2381. At least in formulating its plans for the General Assembly, the district court's opinion indicates that the court was guided almost entirely by concern for following political boundaries, see SRAC J.S. App. 62-78; it did not consider that state policy, such as it may be, as just one factor to be weighed under the totality of the circumstances. That error was compounded by the court's misconception that it was not required to grapple fully in this case with the requirements of Section 2. See, *e.g.*, *id.* at 79 (expressing court's conclusion that its plan for the state House of Representatives satisfies the Voting Rights Act "given the nature of this proceeding"). Instead, in each disputed instance, the court should have evaluated what it viewed as the State's policy preferences in light of the extent of racial polarization in the locality involved and the existence of a black population capable of forming a majority in a compact and contiguous district.[13] Once again, the court's failure to conduct such

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and ultimately declared that its plan was best in "avoiding the 'political thicket' that arises in pitting large numbers of incumbents against one another." *Id.* at 75. If there is in fact a consistent state policy of protecting incumbents, the court may consider it in fashioning a plan. See, *e.g.*, *Jeffers* v. *Clinton*, 730 F. Supp. at 214-215. To do so, however, the court must find such a policy based on specific evidence or legal sources, and must evaluate its application to ensure that protecting incumbents (of whatever political party) does not dilute minority voting strength in violation of Section 2. See *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991).

[13] The district court rejected plans creating more black-majority districts with the general statement that they did so "without regard to any interest but race and without the clear necessity which justifies a § 2 remedy." SRAC J.S. App. 76. But the court could not adequately support its conclusion that the proposed districts

a district-by-district evaluation both calls into question the validity of its plans under Section 2 and renders orderly appellate review of those plans (and the legal and factual conclusions on which they are based) unnecessarily difficult.

3. We believe that under the circumstances of this case the district court erred in failing to consider thoroughly whether its remedial redistricting plans comply fully with Section 2. In formulating such plans, a court is obligated to "exercise its traditional equitable powers to fashion the relief so that it * * * fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982). See generally *Wise* v. *Lipscomb*, 437 U.S. 535, 541 (1978); *Connor* v. *Finch*, 431 U.S. 407, 415 (1977).

Given the time constraints that the court faced at the time, we do not question its decision to impose its plans in their current form for purposes of the 1992 elections. But because the court's "interim" plans may as a practical matter remain in place for the next decade, we think that the court was required to afford all parties the opportunity to present specific Section 2 objections before imposing those plans for use in future elections. The court should have received and reviewed evidence concerning each challenged district, considered that evidence in light of all of the relevant factors enumerated in *Gingles*, and included in its opinion specific, reviewable findings of fact and conclusions of law with respect to each such district's compliance with federal law. Such a process would be fair to the parties, present the district court with a judicially manageable task, take advantage of the district court's considerable familiarity with the specific facts

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were unjustified without considering the totality of the circumstances in each disputed area, 42 U.S.C. 1973(b), in light of all the considerations enumerated by this Court in *Gingles*.

and arguments in this case, and properly assist this Court in its appellate review.

CONCLUSION

The judgment of the district court should be vacated and the case should be remanded with instructions to the district court to determine whether its plans, to the extent they are applicable to post-1992 elections, comply in all respects with Section 2 of the Voting Rights Act.

Respectfully submitted.

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MAY 1993

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

Civil Action No. 3-91-2983-1
(Three-Judge Court Requested)

MICHAEL G. BURTON as Executive Director and on behalf of the Republican Party, WILLIAM P. COLLINS, III, EARL COPELAND, WILLIAM PATRICK FLACK, FRANK E. GIBSON, III, NANCY D. HAWK, and GUS ROBERTS, PLAINTIFFS

v.

ROBERT J. SHEHEEN, in his representative capacity as Speaker of the South Carolina House of Representatives, NICK THEODORE, in his representative capacity as presiding officer of the South Carolina Senate, JAMES B. ELLISOR, in his representative capacity as Executive Director of the State Election Commission and CARROLL A. CAMPBELL, JR. in his representative capacity as the Governor of South Carolina, DEFENDANTS

[Filed Oct. 4, 1991]

COMPLAINT

(Declaratory Judgment; Equitable Relief Sought)

A. PRELIMINARY STATEMENT

1. Plaintiffs request that this Court draw a reapportionment plan for the General Assembly of the state of South Carolina and for the Congressional

delegation of the state of South Carolina for the 1992 elections. This action is necessary because the South Carolina Senate and the South Carolina House of Representatives in General Assembly have failed by means of the legislative process to produce a reapportionment plan for either the General Assembly or the Congressional delegation. That process is deadlocked. Without this court's action, rights secured to the people of South Carolina pursuant to Article I, Section 2 of the Constitution of the United States, the Fourteenth and Fifteenth Amendments of the Constitution of the United States and pursuant to 42 U.S.C. Section § 1973 *et seq.* and 1983 will be violated as the House and Senate districts of the South Carolina General Assembly and the Congressional districts are no longer apportioned according to the principle of one person one vote. This court's intervention is necessary in order to have a plan in place for the election process in 1992.

B. JURISDICTION

2. Jurisdiction is conferred on this court pursuant to 28 U.S.C. 1331 and 1343 and 28 U.S.C. 2201.

3. A three-judge district court is required pursuant to 28 U.S.C. 2284(a) because this action challenges the constitutionality of the apportionment of statewide legislative bodies and of Congressional districts.

(b) Pursuant to 28 U.S.C. 2284(b)(2) notice of this action has been given to the Governor and the Attorney General of the State of South Carolina by sending each via certified mail a copy of this complaint.

C. THE PARTIES

4. Michael Burton is a registered voter of the State of South Carolina residing in Columbia, SC, and is the executive director of the State Republican Party. He submitted on behalf the Republican Party a plan for reapportionment of the South Carolina Senate.

5. William P. Collins, III is a registered voter of South Carolina, residing in Chapin and is under-represented in the State House and Senate (Districts 85 and 23) because of population changes such that the South Carolina House and Senate are no longer apportioned on the basis of one person one vote.

6. Earl Copeland is a registered voter of the State of South Carolina, residing in Hanahan, and is under-represented in the State House and Senate (Districts 99 and 38) because of population changes such that the South Carolina House and Senate are no longer apportioned on the basis of the one person one vote.

7. William Patrick Flack is a registered voter of the State of South Carolina, residing in Anderson, and further is a member of the black population of South Carolina which is under-represented in the State Senate, House of Representatives, and in the Congressional delegation within the state.

8. Frank E. Gibson, III, is a registered voter of the State of South Carolina, residing in Beaufort, and is under-represented in the State House and Senate (Districts 124 and 46) because of population changes such that the South Carolina House and Senate are no longer apportioned on the basis of one man one vote.

9. Nancy D. Hawk is a registered voter of the State of South Carolina, residing in Charleston (1st

Congressional District), and is under-represented in the Congress of the United States because of population changes such that the South Carolina Congressional districts are no longer apportioned on the basis of one person one vote.

10. Gus Roberts is a registered voter of the State of South Carolina, residing in Columbia, and further is a member of the black population of South Carolina which is under-represented in the State Senate, House of Representatives, and in the Congressional delegation within the state.

11. The defendants are sued in their representative capacity as officers of the State of South Carolina and its legislature in Richland County at Columbia.

12. Robert J. Sheheen is sued in his representative capacity as Speaker of the State House of Representatives, an arm of the South Carolina General Assembly which together with the South Carolina Senate has failed to adopt a reapportionment plan for submission to the Governor.

13. Defendant Nick Theodore is the Lt. Governor of the State of South Carolina and the presiding officer of the State Senate, an arm of the South Carolina General Assembly which together with the South Carolina House of Representatives has failed to adopt a reapportionment plan for submission to the Governor.

14. James B. Ellisor is sued in his representative capacity as the Executive Director of the State Election Commission and the state officer charged with carrying out elections.

15. Carroll A. Campbell, Jr. is sued in his representative capacity as the Governor of the State of South Carolina, the constitutional officer of the state

to whom the General Assembly failed to present a reapportionment plan.

FOR A FIRST CAUSE OF ACTION

D. One Person One Vote

16. There has been a significant shift in population among the South Carolina Senate districts, the South Carolina House of Representatives districts, and the South Carolina Congressional districts, as is disclosed by the 1990 decennial census.

17. The South Carolina Senate and House of Representatives in General Assembly and the Congressional districts of South Carolina are no longer apportioned according to the principle of one man one vote, as required by the United States Constitution.

18. The South Carolina General Assembly has not produced for signature of the Governor a plan for the reapportionment of the State Senate, the State House Representatives, or the Congressional districts within South Carolina and is in adjournment until January 1992.

19. The reapportionment process is deadlocked in that neither the South Carolina House or Senate has adopted each others plans for its own chamber and for Congress and the Governor has advised he will veto those plans if they were presented to him.

20. The General Assembly will not reconvene until January 1992 thereby ensuring that a reapportionment plan will not be timely adopted with the result that citizens will not reasonably know within which district they may run for office or who their candidates will be, the boundaries of the districts and who the inhabitants of the districts will be.

21. Candidates for the South Carolina Senate and the South Carolina House of Representatives must file their notices of candidacy and pledge by March 30, 1992 in order to take part in primary elections as nominees of a political party for the State Senate or House of Representatives, all pursuant to 1976 South Carolina Code § 7-11-210.

22. Candidates as members of Congress must file their notices of candidacy and pledge by April 30, 1992 in order to take part in a primary election as a members of a political party for such seat, all pursuant to 1976 South Carolina Code § 7-11-210.

23. Two weeks prior to the dates set out in the two paragraphs above, advertisements in newspapers trigger the filing periods for the offices set forth above, pursuant to 1976 South Carolina Code § 7-13-45.

24. 1976 South Carolina Code § 7-13-40 requires that the political parties utilizing primary elections hold their primary elections on the second Tuesday in June, i.e. June 9, 1992.

25. Citizens of South Carolina who will participate as electors in the above primaries must register to vote no later than 30 days prior to that primary date, i.e. May 9, 1992.

26. South Carolina is a jurisdiction covered by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

27. Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c prohibits the enforcement in South Carolina of any legislative reapportionment plan which has not first been approved by a declaratory judgment action in the United States District Court for the District of Columbia *or* has

been submitted to the Attorney General of the United States and was the subject of no objection within a sixty (60) day period following information, thereby extending for another sixty days the time before a plan may be implemented.

28. It is unreasonable to rely upon any reapportionment plan produced through the South Carolina legislative process being adopted such that at least sixty (60) days will elapse following final approval of the plan before the electorial process begins, the minimum time required for Justice Department preclearance.

29. The present apportionment of the South Columbia Senate and the South Carolina House of Representatives as described above results in plaintiffs being under represented, does not comply with the one person one vote principle for legislative apportionment, and denies plaintiffs their right to equal protection under the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

30. The present apportionment of South Carolina's Congressional districts results in over representation and under representation and is therefore in violation of Article I § 2 of the Constitution of the United States, providing in part that members of the House of Representatives be chosen "by the People of the several states" requiring as nearly as practicable that such person's vote in a Congressional district be equal.

31. Given the requirements of the Voting Rights Act of 1965, as amended, and the statutory frame work for elections in South Carolina, it is clear that without the intervention of the court in reapportioning South Carolina that elections will not be held in a manner which will fairly permit seriously contested elections as there will be insufficient time to recruit

qualified candidates within new district lines, thereby giving incumbents unfair advantage and causing irreparable harm to plaintiffs and others.

32. Plaintiffs' votes are and will be diluted in individual districts as are the votes of other voters across the state if the court does not intervene expeditiously so as to reapportion the state on a timely basis; an untimely reapportionment will so favor incumbents so as to put challengers at an unfair disadvantage, thus causing plaintiffs, voters and candidate alike to suffer harm and irreparable damage.

FOR A SECOND CAUSE OF ACTION

E. VIOLATION OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED.

33. The plaintiffs reallege paragraphs 1 through 28 as if restated here verbatim.

34. The present apportionment of the South Carolina Senate, of the South Carolina House of Representatives, and of the Congressional districts in South Carolina is in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, in that the black citizens of South Carolina, a protected class under the statute, have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

35. The South Carolina Senate has 10 black majority districts out of 46; the South Carolina House of Representatives has 27 black majority districts out of 124; there is no black majority district among the six Congressional districts in South Carolina.

36. The distribution of population throughout the state of South Carolina permits the creation of 14

black majority Senate districts rather tha[n] 10, 35 majority black House districts rather than 27, and 1 black Congressional district rather than none.

37. In the South Carolina House of Representatives the distribution of the black population would permit the creation of 35 black majority districts with black percentage populations as follows:

Districts over 60%—	20
Districts between 55-60%—	11
Districts between 50-55%—	4

38. The creation of such House districts would increase the opportunity of blacks to participate in the political process and elect representatives of their choice either by electing candidates expressing wholly their own views or electing candidates with whom they would have very significant influence.

39. The distribution of the population in South Carolina would permit the creation of 14 black majority Senate districts with black percentage populations as follows:

Districts over 60%—	8
Districts between 55-60%—	5
Districts between 50-55%—	1

40. The creation of such Senate districts would increase the opportunity of blacks to participate in the political process and elect representatives of their choice either by electing candidates expressing wholly their own views or electing candidates with whom they would have very significant influence.

41. The distribution of population in South Carolina would permit the creation of at least 1 black-majority Congressional district with a black percentage population approximating 65%.

42. The creation of such Congressional district would increase the opportunity of blacks to participate in the political process and elect representatives of their choice either by electing candidates expressing wholly their own views or electing candidates with whom they would have very significant influence.

43. The present apportionment of the South Carolina Senate, of the House of Representatives and of the Congressional districts is in violation of the Voting Rights Act of 1965, as amended, because the effect of the present system is to under represent blacks in the South Carolina General Assembly and in the South Carolina Congressional delegation.

44. The geographical compactness of the black population is sufficient to create the districts described above.

45. There is among the minority population of South Carolina a political cohesion making such districts possible.

46. There is in South Carolina a history of bloc voting by the majority population which continues to this day.

47. Failure to apportion the South Carolina House, Senate and Congressional districts according to the Voting Rights Act of 1965, as amended, will cause irreparable harm to black plaintiffs and will cause irreparable harm to plaintiffs generally as compliance with the act is necessary for a lawful reapportionment under which to conduct elections in 1992.

Wherefore, plaintiffs pray

1. That the court find and declare:

    a. That the present apportionment of the South Carolina Senate and House of Representatives is in violation of the Fourteenth Amendment to the United States Constitu-

tion and 42 U.S.C. § 1983 in that the districts are not fair and equal, as practicable;

b. That the present apportionment of the South Carolina Congressional districts is in violation of Article I, § 2 of the United States Constitution in that the districts are not fair and equal, as practicable;

c. That the present apportionment of the South Carolina Senate and House of Representatives is in violation of 42 U.S.C. § 1973 et seq. and the Fifteenth Amendment to the United States Constitution;

d. That the present apportionment of the South Carolina Congressional districts is in violation of Article I, § 2 of the United States Constitution and 42 U.S.C. § 1973; and

e. That the legislative process in South Carolina is at an impasse and that without the court's intervention reapportionment will not occur so as to be available to provide to the citizenry time within which it is practicable to recruit candidates, declare as candidates, and campaign with knowledge of district boundaries, all to the irreparable harm of plaintiffs.

2. That the court adopt and impose on defendants:

a. An Injunction prohibiting the use of the present South Carolina Senate, House and Congressional district lines for the 1992 elections;

b. A reapportionment plan for the South Carolina Senate and House of Representatives;

c. A reapportionment plan for the South Carolina Congressional districts;

d. A reapportionment plan for the General Assembly and Congressional districts which complies with the requirements of the Voting Rights Act of 1965, as amended, with such plan creating 35 black majority seats in the House, 14 black majority seats in the Senate; and 1 black Congressional district.

3. That the court impose such reapportionment plan by December 31, 1992.

4. That court award to plaintiffs reasonable attorney's fees and costs as provided by 42 U.S.C. § 1988 et seq.

5. That the court grant such other and further relief as the court may deem just and proper.

Oct. 3, 1991

SINKLER & BOYD, P.A.

By: /s/ Thomas R. Gottshall
THOMAS R. GOTTSHALL
Federal I.D. No. 2406

By: /s/ Steve A. Matthews
STEVE A. MATTHEWS
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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:91-3310-1
(Three-Judge Court Requested)

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, DR. WILLIAM GIBSON, BISHOP FREDERICK CALHOUN JAMES, REV. HERBERT WILLIAMS, WILLIE B. OWENS, and SOUTH CAROLINA STATE CONFERENCE OF THE NAACP BRANCHES, Plaintiffs

vs.

CARROLL A. CAMPBELL, JR., in his official capacity as Governor of South Carolina; NICK THEODORE, in his official capacity as Lieutenant Governor and presiding officer of the South Carolina Senate; ROBERT J. SHEHEEN, in his official capacity as Speaker of the South Carolina House of Representatives; and, JAMES B. ELLISOR, in his official capacity as Executive Director of the South Carolina State Election Commission, Defendants

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[Filed Oct. 31, 1991]

COMPLAINT

I. *The Nature of the Case*

1. This is an action to enforce Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the

First, Thirteenth, Fourteenth and Fifteenth Amendments and Article I, Section 2 of the Constitution of the United States, and Article III, Section 3 of the Constitution of South Carolina. Plaintiffs seek declaratory and injunctive relief against continued use of the existing congressional and legislative districts in South Carolina on the grounds that they are malapportioned on the basis of population and dilute minority voting strength. Plaintiffs also seek court ordered, interim redistricting plans on the ground that the General Assembly has failed to apportion the state's congressional and legislative districts following the 1990 Census, and there is not enough time prior to the next elections for the General Assembly to redistrict and comply with the preclearance provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

II. *Jurisdiction*

2. Plaintiffs invoke the jurisdiction of this Court under 28 U.S.C. §§ 1331, 1343(a)(4), and 2201, this suit being authorized by 42 U.S.C. §§ 1973j(f) and 1983. A three judge court is required by 28 U.S.C. § 2284(a) to hear plaintiffs' challenge to the constitutionality of the apportionment of the state's congressional and legislative districts.

III. *Parties*

3. Plaintiff Statewide Reapportionment Advisory Committee (SRAC) is an unincorporated association of private individuals and organizations in South Carolina. Its goals include insuring that elections are held for Congress and the General Assembly in a timely manner, and in conformity with the Voting Rights Act and the Constitution of the United States.

SRAC sues on its own behalf and on behalf of its members.

4. Plaintiffs Dr. William Gibson, Bishop Frederick Calhoun James, Rev. Herbert Williams and Willie B. Owens, are black, or African-American, residents and registered voters of South Carolina. They desire to participate in the electoral and political processes of South Carolina in a timely manner and on an equal basis with white residents.

5. The personal plaintiffs reside in congressional and legislative districts which are malapportioned on the basis of population, and some of the plaintiffs reside in areas where black majority congressional and legislative districts can be drawn.

6. Plaintiff South Carolina State Conference of the NAACP Branches (NAACP) is an organization composed of the county branches of the NAACP in South Carolina. The NAACP is a membership organization whose goals include securing the equal treatment of blacks and other citizens in the electorate without regard to race or color. The NAACP sues on its own behalf, and on behalf of its branches and members.

7. Defendant Carroll A. Campbell, Jr. is a resident of South Carolina and is the chief executive officer and Governor of South Carolina. He may on extraordinary occasions convene the General Assembly in extra session, and has the duty of signing or vetoing bills which have passed the General Assembly before they become law. He is sued in his official capacity.

8. Defendant Nick Theodore is a resident of South Carolina and is the Lieutenant Governor of South Carolina. He is the President of the Senate, ex officio, one of two branches of the General Assembly in which

is vested the legislative power of the state. He is sued in his official capacity.

9. Defendant Robert J. Sheheen is a resident of South Carolina and is the Speaker of the House of Representatives, one of two branches of the General Assembly in which is vested the legislative power of the state. He is sued in his official capacity.

10. James B. Ellisor is a resident of South Carolina and is the Executive Director of the State Election Commission, which has general supervisory authority over elections in the state. He is sued in his official capacity.

IV. *Facts*

11. The General Assembly has the duty under state and federal law (S.C. Constitution, Art. III, § 3; U.S. Constitution, Article I, Section 2) of reapportioning congressional and legislative districts in South Carolina every ten years based upon a true and correct enumeration of inhabitants.

12. Based upon the 1990 Census, the existing congressional districts in South Carolina contain a total deviation from ideal district size of 8.3%, and are malapportioned on the basis of population in violation of Article I, Section 2 of the Constitution.

13. Based upon the 1990 Census, the existing districts for the House of Representatives contain a total deviation from idea district size of 113.9%, and are malapportioned on the basis of population in violation of the one person, one vote principle of the Fourteenth Amendment.

14. Based upon the 1990 Census, the existing districts for the Senate are malapportioned on the basis of population in violation of the one person, one vote principle of the Fourteenth Amendment.

15. Despite the malapportionment of existing congressional and legislative districts, the General Assembly considered but failed to enact any redistricting plans at its last (1991) legislative session.

16. The General Assembly, which is in adjournment until January 14, 1992, is at an impasse as far as reapportionment is concerned because of disagreement between the House of Representativs and the Senate over congressional and legislative district boundaries.

17. The Governor has stated publicly that he would veto any of the redistricting plans considered by the General Assembly during its 1991 regular session, and has refused to convene the General Assembly in extra session to consider and enact congressional and legislative redistricting.

18. Primary elections for Congress and the General Assembly are scheduled for June 9, 1992, and the general election is scheduled for November 10, 1992.

19. Candidates in the primary elections for the House of Representatives and Senate must file their notices of candidacy and pledge by 12:00 o'clock noon, March 30, 1992 (S.C. Code § 7-11-210).

20. Candidates in the primary elections for Congress must file their notices of candidacy and pledge by 12:00 o'clock noon, April 30, 1992 (*Id.*).

21. Two weeks before the filing period begins—on March 15, 1991 for general assembly elections and April 15, 1991 for congressional elections—party officials are required to place an advertisement in a newspaper of general circulation notifying the public of the dates of the filing period, the offices which may be filed for, and the manner in which filing may be made (S.C. Code § 7-13-45).

22. South Carolina is covered by the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, with the result that no congressional or legislative redistricting plan enacted by the General Assembly and signed into law by the Governor can be implemented unless and until it is precleared, either administratively by the Attorney General or judicially by the Federal District Court for the District of Columbia.

23. The Attorney General has a period of sixty (60) days from the date a submission is deemed complete within which to object, and may extend the preclearance period for an additional sixty (60) if he requests additional information.

24. The Subcommittee on Reapportionment and Redistricting of the Senate Judiciary Committee issued a time line for reapportionment which contemplated that congressional and legislative redistricting plans be submitted for preclearance no later than November, 1991 in order to provide adequate time for Section 5 review.

25. Given the impasse over congressional and legislative redistricting in the General Assembly, the Governor's refusal to call a special legislative session to consider and enact redistricting, the Governor's statement that he would veto the redistricting that was being considered by the General Assembly, and the requirement of Section 5 preclearance, it is a virtual certainty that the state will not be able to enact and implement congressional and legislative redistricting in compliance with the Voting Rights Act and the Constitution prior to the next elections in 1992.

26. Blacks in South Carolina are sufficiently numerous and geographically compact that they would

constitute a majority in one or more single-member districts for Congress and both houses of the General Assembly.

27. Under the existing apportionment, all of the state's congressional districts are majority white, although it is possible to draw at least one reasonably compact and contiguous congressional district that contains a majority of black residents.

28. Under the existing apportionment, there are ten (10) out of forty-six (46) senate districts that contain a majority of black residents, although it is possible to draw at least fourteen (14) reasonably compact and contiguous senate districts that contain a majority of black residents.

29. Under the existing apportionment, there are twenty-seven (27) out of 124 house districts that contain a majority of black residents, although it is possible to draw thirty-seven (37) or thirty-eight (38) reasonably compact and contiguous house districts that contain a majority of black residents.

30. Blacks in South Carolina are politically cohesive, in that they tend to vote as a bloc, have common socio-economic characteristics and have organized themselves collectively for political activity.

31. Candidates for elective office preferred by blacks in South Carolina are usually defeated by the white majority voting as a bloc.

32. Historically, black residents of South Carolina have been subject to private as well as official discrimination on the basis of race, including discrimination in attempting to exercise their right of franchise and to participate equally with white residents in the political processes.

33. Black residents of South Carolina bear the effects of discrimination on the basis of race in educa-

tion, housing, employment, and health services which have resulted in a lower socio-economic status which hinders their ability to participate effectively in the political process.

34. Voting in South Carolina is racially polarized.

35. The existing congressional and legislative districting in South Carolina dilutes the voting strength of blacks.

36. The use of a majority vote requirement in primary elections for Congress and the General Assembly enhances the opportunity for discrimination and further dilutes minority voting strength.

37. Because of the existing discriminatory districting for Congress and the General Assembly, black residents of South Carolina have been discouraged from running for office.

38. No black has ever been elected to Congress from South Carolina in modern times, and blacks have been elected to the General Assembly primarily from districts in which members of their race were the majority.

39. Blacks in South Carolina have less opportunity than white residents to participate in the political processes and to elect candidates of their choice.

40. The policy underlying the existing congressional and legislative districting in South Carolina is tenuous.

41. The purpose and result of the existing congressional and legislative districting in South Carolina is to deny or abridge the right of black residents to vote on the basis of race or color.

42. If the existing congressional and legislative districting are used in the 1992 elections, or if the state postpones or delays the elections because of its

inability to enact redistricting and comply with the preclearance requirements of Section 5, plaintiffs will be seriously injured and their right to vote will be diluted or denied.

43. Plaintiffs have brought this action at the present time to insure that the issues presented herein may be considered in a timely manner, and that any remedies for the denial of plaintiffs' rights, including interim, court ordered elections, may be implemented in an orderly fashion with a minimum of disruption to candidates and voters, and to the electoral process.

44. The defendants' actions complained of herein are under color of law of the State of South Carolina.

First Cause of Action

45. The defendants' actions in using and maintaining the existing congressional and legislative districts in South Carolina, which are malapportioned on the basis of population and result in the denial or abridgment of the right to vote on the basis of race or color, deny plaintiffs' rights guaranteed by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the First, Thirteenth, Fourteenth and Fifteenth Amendments and Article I, Section 2 of the Constitution of the United States.

Second Cause of Action

46. The existing congressional and legislative districts in South Carolina were enacted and are being maintained with the racially discriminatory purpose of diluting the voting strength of black residents of South Carolina in violation of plaintiffs' rights guaranteed by Section 2 of the Voting Rights Act, and the

First, Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution of the United States.

Third Cause of Action

47. The refusal or failure of defendants to reapportion congressional and legislative districts in South Carolina based upon a true and correct enumeration of inhabitants denies plaintiffs' rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment and Article I, Section 2 of the Constitution of the United States, and Article III, Section 3 of the Constitution of South Carolina.

V. *Equitable Relief*

48. A real and actual controversy exists between the parties. Plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief. Plaintiffs are suffering irreparable injury as a result of the violations complained of herein and that injury will continue unless declared unlawful and enjoined by this Court.

WHEREFORE, plaintiffs respectfully pray that this Court:

(1) take jurisdiction of this case;

(2) enter a declaratory judgment that the use of the existing congressional and legislative districts in South Carolina violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the First, Thirteenth, Fourteenth, and Fifteenth Amendments and Article I, Section 2 of the Constitution of the United States, and Article III, Section 3 of the Constitution of South Carolina, and enter a permanent injunction against their further use;

(3) enter a declaratory judgment that the refusal or failure of the defendants to reapportion congressional and legislative districts in South Carolina based upon a true and correct enumeration of inhabitants, violates the due process and equal protection clauses of the Fourteenth Amendments and Article I, Section 2 of the Constitution of the United States, and Article III, Section 3 of the Constitution of South Carolina and enter a permanent injunction enjoining defendants from failing promptly and immediately to reapportion congressional and legislative districts in accordance with Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, and the Fourteenth Amendment of the Constitution of the United States;

(4) implement interim, court ordered congressional and legislative redistricting to insure that the 1992 primary and general elections are held as scheduled;

(5) award plaintiffs the cost of this action together with their reasonable attorney's fees; and,

(6) retain jurisdiction of this action and grant plaintiffs any further relief which may in the discretion of this Court be necessary and proper to ensure that timely and lawful procedures are used in elections in South Carolina for Congress and the General Assembly.

Respectfully submitted,

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